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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

QUALITY KING DISTRIBUTORS, INC.,

Petitioner,

v.

L'ANZA RESEARCH INTERNATIONAL, INC.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, THE MOTION PICTURE ASSOCIATION OF AMERICA, THE ASSOCIATION OF AMERICAN PUBLISHERS, AMERICAN FILM MARKETING ASSOCIATION, BUSINESS SOFTWARE ALLIANCE, THE INTERACTIVE DIGITAL SOFTWARE ASSOCIATION, NATIONAL MUSIC PUBLISHERS' ASSOCIATION, AND INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae are trade associations representing the interests of the principal copyright-based industries in the United States, including sound recordings, motion pictures, computer software, books, and musical compositions. Copyright-based industries contribute in excess of $300 billion to the U.S. economy, and grow at a real annual rate that is twice the growth rate of the U.S. economy as a whole. While the United States continues to experience large trade deficits, copyright industries consistently post significant balance-of-trade surpluses.[2]

Due to the significant foreign sales of U.S. copyrighted works, *amici curiae* and their member companies are regularly harmed by trafficking in so-called "parallel imports." Each year tens of billions of dollars of sound recordings, motion pictures, software products, books, and works embodying musical compositions are produced in the United States and abroad for foreign sale and distribution. Significant quantities of these works are imported into and distributed in the United States without the authorization of the U.S. copyright owners. Such activities disrupt the marketing plans of the U.S. copyright owners and deprive them of substantial sales and revenues. Because of the territorial scope of copyright protection and licensing

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1 *Amici curiae* have received written letters of consent to file this brief from petitioner and respondent, and are filing these consent letters separately with the Clerk of the Court. No counsel for either of the parties authored this brief in whole or in part. No person or entity, other than *amici curiae*, their members and their counsel, made a monetary contribution to the preparation or submission of this brief.

2 *See* STEPHEN E. SIWEK & GALE MOSTELLER, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 1996 REPORT (International Intellectual Property Alliance 1996).

practices, *amici* regularly seek enactment and enforcement throughout the world of parallel import protections against unauthorized cross-border movements of copyrighted works.

Amici curiae therefore have a vital stake in the outcome of this litigation: A decision reversing the Ninth Circuit's holding would have serious economic consequences for their ability to market successfully their works in the U.S. market, and would upset the delicate balance of rewards and incentives Congress struck in enacting the Copyright Act as a spur to creativity for the public good. A decision undermining the strict provision against parallel imports in the United States Copyright Act would also adversely affect *amici*'s ability to seek enactment of similar protections under foreign laws.

The Recording Industry Association of America, Inc. ("RIAA") is a not-for-profit corporation, membership in which consists of sound recording producers and phonorecord manufacturers. RIAA's members create, manufacture or distribute more than ninety percent of the authorized sound recordings in the United States, including longplaying records, cassette tapes and compact discs. Sound recordings comprise a $12.5 billion domestic industry, and the foreign sales of U.S. recorded music amount to more than $12 billion, representing approximately sixty percent of the world's consumption of music. Among RIAA's purposes are to oversee copyright infringement litigation for member companies, combat all forms of music piracy throughout the world, and ensure that copyright legislation maintains the appropriate balance for fostering creativity in music through increased investment, production and distribution.

The Motion Picture Association of America, Inc. ("MPAA") is a not-for-profit corporation founded in 1922 as the trade association of the American film industry. MPAA promotes the interest of the motion picture industry in the

United States by seeking to protect the rights of copyright owners; serving as the advocate for the major producers and distributors of motion pictures, television programs and home video; directing an antipiracy program to protect U.S. films, television programming and home video throughout the United States; and helping the industry maintain high standards and public goodwill. MPAA represents seven of the largest producers and distributors of filmed entertainment for theatrical, television and home video distribution. MPAA members distribute motion pictures in some eighty countries throughout the world and have been prime beneficiaries of the protections afforded by copyright, including protections against the unauthorized importation of copies.

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately 200 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish hardcover and paperback books in every field, including general fiction and non-fiction; poetry; children's books; textbooks; religious books; reference works; scientific, medical, technical, and professional books and journals; and classroom instructional and testing materials. AAP's primary functions are to promote the status of publishing around the world, assist in protecting its members' copyrights at home and abroad, and defend intellectual freedom at home and the freedom of written expression worldwide.

American Film Marketing Association ("AFMA") is a non-profit organization whose members produce and license the international rights to independent English-language films. Comprised of 130 members, AFMA members generate international revenues in excess of $1.6 billion annually.

Business Software Alliance ("BSA") promotes the growth of the software industry through its international public policy, education, and enforcement programs in 65 countries throughout North America, Europe, Asia, and Latin America. BSA worldwide members include the leading publishers of software for personal computers. BSA operates more than fifty hotlines around the world for callers seeking information about copyright matters or to report suspected incidents of unauthorized copying of software.

The Interactive Digital Software Association ("IDSA") represents the U.S. interactive entertainment software industry. The IDSA membership includes 45 of the leading U.S. publishers of interactive entertainment software such as video and computer games for all platforms, including video game consoles, personal computers, and the Internet. The IDSA offers services to entertainment software publishers including a global anti-piracy program, business and consumer research, government relations, and First Amendment and intellectual property protection efforts.

National Music Publishers' Association ("NMPA") is a trade association representing over 600 U.S. businesses that own, protect, and administer copyrights in musical works. For eight decades, NMPA has served in the national and international arenas as the voice of the American music publishing industry. NMPA's wholly-owned subsidiary, The Harry Fox Agency, Inc. ("HFA"), acts as agent for approximately 17,000 U.S. publishers in connection with the issuance of mechanical licenses, covering the majority of musical compositions contained in U.S. records, tapes, compact discs, and imported phonorecords. Through reciprocal representation agreements with similar collecting societies throughout the world, HFA provides royalty collection and distribution services to its publisher principals on a global basis. HFA also licenses musical works on a

worldwide basis for use in films, commercials, television programs, and other types of audio visual media.

The International Intellectual Property Alliance ("IIPA") is a coalition representing the U.S. copyright-based industries -- computer software, films, videos, music, recordings, and books -- in efforts to improve international protection of copyrighted works. It is comprised of the seven trade associations that are *amici curiae* in this brief.

SUMMARY OF ARGUMENT

The issue presented in this case involves the interplay of provisions of the Copyright Act that are of vital significance for copyright-based industries. The section 602(a) right against unauthorized imports is critical for ensuring copyright owners control over the timing, price, and content of their releases within the U.S. market. Petitioner's attempt to cast the issue before the Court, in the factual situation presented, as an attempt to use the copyright law to circumvent the limitations of the trademark and customs laws should not encourage evisceration of a statutory right that is of great importance to copyright-based industries.

Petitioner's theory of the interplay of the three provisions at issue -- section 602(a), section 106(3), and section 109(a) -- is fundamentally flawed. The first sale doctrine of section 109(a) is not a defense to claims against unauthorized acts of importation. By its terms, it authorizes an owner of a legitimate copy to sell or otherwise dispose of possession of that particular copy, not to import the copy into the United States.

Nor does the first sale doctrine provide a defense to subsequent U.S. sale of copies imported without the consent of the copyright owner when those copies were initially distributed outside the United States. For nearly a century, this Court has held that the Copyright Act has no application

to acts occurring outside the boundaries of the United States. A copyright owner's distribution of copies abroad does not constitute an exercise of the exclusive distribution under section 106(3) of the U.S. Copyright Act. Rather, a foreign distribution of copies is governed by foreign copyright law.

Section 109(a) of the U.S. Copyright Act, however, limits only the section 106(3) right and cannot limit or exhaust distribution rights conferred by foreign law. Because a copyright owner thus retains a valid and subsisting section 106(3) right with respect to copies distributed abroad, the owner may, without limitation of the first sale defense, maintain a section 602(a) claim against unauthorized importation of copies distributed abroad, and a section 106(3) claim against subsequent U.S. sale of such copies. To hold otherwise would be to render section 602(a) virtually meaningless, to disregard nearly a century of consistent jurisprudence concerning the territorial limitations of the Copyright Act, and to rewrite the Copyright Act's limitations on exclusive rights of copyright owners as affirmative rights of copyright users.

ARGUMENT

UNAUTHORIZED IMPORTATION AND SUBSEQUENT SALE OF GOODS DISTRIBUTED BY THE COPYRIGHT OWNER OUTSIDE THE UNITED STATES INFRINGE THE COPYRIGHT OWNER'S EXCLUSIVE DISTRIBUTION RIGHT

I. This Case Involves Statutory Provisions Of Great Significance To Copyright-Based Industries

Petitioner would have this Court base a narrow interpretation of the section 602(a) right on L'anza's use of allegedly "limited creative rights" in "hair care products [that] happen to contain a small amount of copyrighted material on

the labels." Brief for Petitioner ("Pet. Br.") at 9. *See also* Brief of AFTA as *Amicus Curiae* In Support of Petitioner at 3. Noting that "manufacturers have failed in their attempts to use trademark and customs laws to further domestic price discrimination," petitioner echoes the Third Circuit in *Sebastian*, that "[t]o allow L'anza to use those labels to further a private commercial strategy of maintaining inflated prices in this country would subvert the true purposes of the Copyright Act" to motivate creative activity. Pet. Br. at 33. *See generally Sebastian Int'l, Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093, 1094 (3d Cir. 1988).

The issue before this Court has implications beyond the ability of manufacturers to protect copyrighted labels on consumer goods. The legal principles that petitioner and its supporting *amici* would have this Court adopt in interpreting the Copyright Act would have devastating consequences for the protections provided under the Act to industries developing creative works in which the principal value is copyright. For creators and producers of motion pictures, sound recordings, books, musical compositions, and software products, including *amici*, the rights conferred by section 106(3) and section 602(a) are not merely incidental to the Copyright Act's structure of incentives to create original works. Rather, for copyright-based industries, the right to control initial distribution of original works within the United States is integral to the Copyright Act's protections designed to foster creativity for the public good.

A. Section 106(3) And Section 602(a) Provide Copyright Owners Rights Against Distinct Acts Of Infringement

Section 106 of the Copyright Act grants to copyright owners several exclusive rights with respect to copyrighted works, "[s]ubject to" specified limitations set forth in "sections 107 through 120." 17 U.S.C. § 106. Among these exclusive rights is the right "to distribute copies or

phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3).

The distribution right in section 106(3) is an integral component of the balance of incentives enacted by Congress in the Copyright Act. By recognizing a distinct exclusive distribution right, the Copyright Act ensures that, in addition to preventing unauthorized reproductions of copyrighted works, an owner may prohibit unauthorized exploitation of such works through public distribution. "Therefore, granting the distribution right is a necessary supplement to the reproduction right in order fully to protect the copyright owner." 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (1997) § 8.12[A], at 8-142.

However, as an affirmative right, section 106(3) is not simply a supplement to the right to control reproduction of copyrighted works. "[I]t would be anomalous indeed if the copyright owner could prohibit public distribution of his work when this occurred through unauthorized reproduction, but were powerless to prevent the same result if the owner's own copies (or copies authorized by him) were stolen or otherwise wrongfully obtained and thereafter publicly distributed." *Id.* The distribution right, subject to statutorily enumerated limitations, thus allows a copyright owner the exclusive right to control distribution of legitimate as well as pirated copies, and to prevent others from distributing legitimate copies of copyrighted works without the owner's consent.

As this Court has recognized, the distribution right set forth in section 106(3) is in essence "a distinct statutory right . . . 'to control the first public distribution of an authorized copy'" of a copyrighted work. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552 (1985) (quoting 1976 House Report). The Copyright Act's design "to motivate the creative activity of authors and inventors by

the provision of a special reward," *id.* at 546 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)), is vitally furthered by grant of the right to control distribution of authorized as well as unauthorized copies. The section 106(3) right "encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work." *Id.* at 564.[3]

Recognizing the importance of the copyright owner's right to control initial distribution of copyrighted works, Congress also enacted Section 602 as a broad right of action against imports of authorized and piratical copies acquired outside the United States.[4] Section 602(a), governing unauthorized importation of nonpiratical copies, confers upon the copyright owner the right to prevent acts that are distinct from acts of unauthorized distribution. The section 106(3) exclusive distribution right allows a copyright owner to prevent the unauthorized "sale or other transfer of ownership" or possession of a copyrighted work "to the public." By contrast, section 602(a) provides a right of action against unauthorized importation of copies into the United States -- *whether or not those copies are distributed or sold*

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3 In *Harper & Row*, this Court alternatively stated that section 106(3) confers a right of "first publication" and a right of "first distribution," and used "publication" and "distribution" interchangeably in referring to the section 106(3) right. Although distribution may be a form of publication, publication under the statute is a broader concept that encompasses not only "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending," but also includes "[t]he *offering to distribute* copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display." 17 U.S.C. § 101 (emphasis added). Accordingly, publication of a work does not necessarily constitute exercise of the section 106(3) distribution right.

4 The text of section 602 is set forth as an appendix to this brief.

to the U.S. public, and whether or not possession of or control over those copies ever transfers hands.

Importation does not, by definition, necessarily involve sale, transfer of possession, or other distribution. It entails only the carrying of copies or goods across borders. *See* BLACK'S LAW DICTIONARY (6th ed. 1990) at 755 ("Importation -- The act of bringing goods and merchandise into a country from a foreign country.") (citing *Cunard Steamship Co. v. Mellon*, 262 U.S. 100 (1923)). *See also* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 170 (1976) (section 602(a) allows actions against unauthorized importers of goods acquired abroad "even before any public distribution in this country has taken place"); S. Rep. No. 473, 94th Cong., 1st Sess. 152 (1975) (same). Nor does importation necessarily involve dissemination to the public, as does distribution under section 106(3).

If the importation right did not allow copyright owners to bar acts that were distinct from those actionable under section 106(3) alone, there would be no need for section 602: Unauthorized sale or other U.S. distribution to the public of imported copies would be, and is, actionable by a copyright owner as an infringement of the section 106(3) right. As petitioner notes, section 602(a) adds another weapon in the copyright owner's arsenal above and beyond the distribution right -- the right to prevent unauthorized importation of copies before they are distributed or dispersed to third-party U.S. vendors or purchasers. Pet. Br. at 24.

B. For Copyright-Based Industries, Section 602(a) Protects Core Aspects Of The Exclusive Distribution Right

Contrary to petitioner's position, invocation of section 602(a) for copyright-based industries is not a means of effectuating an end-run around limitations to the parallel import right under the trademark and customs laws. Rather,

preventing unauthorized importation and distribution of copies acquired abroad enables copyright owners to control the timing, content, packaging, pricing, and (in some instances) quality of their releases to the American public -- i.e., the crucial "choices of when, where, and in what form first to publish a work" integral to the section 106(3) right. *Harper & Row*, 471 U.S. at 564. Control over these elements of copyright-based industries' territorial distribution plans is essential to the balance of incentives struck by Congress in the Copyright Act.

1. Timing

The distribution of copyright-based products often follows a pattern of sequential release across geographic markets and among different media. "Staggered" release dates enable copyright owners to coordinate and maximize pre-release publicity for anticipated distributions of works within particular regions. Frequently, for example, distribution of a book or sound recording may be launched initially in a home market abroad, and then subsequently in the United States so that national release may coincide with a U.S. publicity "tour" by the author or recording artist.

Staggered release may serve other purposes as well. A sound recording may be released in markets outside the United States in order to create a popular "buzz" or crescendo of demand before the recording is released in the large U.S. market. Similarly, a foreign film may be initially distributed abroad, with distribution in the United States occurring if and after international demand for the film reaches a particular level. Or in some cases, U.S. films anticipated to have much success may be first released outside the United States, such as the initial release of "Toy Story" in Mexico, to diminish incentives for international piracy. In the book publishing industry, differences in seasonal timing involving the start of the "fall" semester in the

southern and northern hemispheres may create the need for timed release of college textbooks.

Parallel imports and distribution of copyrighted works acquired abroad interfere with copyright owners' ability to exploit their works within a region through control over when a work is first distributed and through coordination of the initial distribution with pre-release publicity. When copies acquired abroad are brought into the country, the copyright owner's exclusive right to control the manner and timing of their distribution within the United States is undermined.

The problem is particularly heightened for copyrighted works that follow a sequential distribution pattern for different formats or media, as well as for different geographic markets. In the book publishing industry, the release of hardback and paperback versions is staggered. A work first distributed or released abroad may progress to paperback version in that market while the title is still in hardback within the United States. Parallel imports of the paperback versions of the work in such instances interfere with the U.S. copyright owner's right to exploit fully the "window" for hardback release.

2. Pricing

Parallel imports also undermine copyright owners' ability to exercise their right to control the pricing of their works, a critical component of the distribution right. Wide price variations between domestic and international markets for copyright-based products are important and necessary for copyright-based industries to exploit their products internationally and to further develop international markets. Such price variations are the result of local demand, local ability to pay, local taxes, local regulations and international treaty obligations, local manufacturing and distribution costs, and local infrastructure.

For example, demand for copyright-based products varies regionally to a unique degree based upon differing cultural tastes and characteristics. Moreover, in the music industry, in particular, different royalty structures mandated by statute or licensing societies in different jurisdictions contribute to regional variations in price. In the book publishing industry, compulsory license provisions in international treaties require publishers in developed countries to grant reprint or translation licenses to developing country publishers "at a reasonable rate" if requested, or else be subject to compulsory license provisions that allow developing country publishers to reprint or translate at prescribed rates. In all copyright-based industries, variations in characteristics of local infrastructure such as household penetration of video cassette recorders, televisions, computers, and compact disc players contribute to national variations in the price of copyrighted works.

As copyright-based industries seek to enter and develop new markets, they try to price their products in a way that makes them attractive to local consumers, while permitting the industries to generate positive net income. This pricing structure is made economically viable by the relatively low marginal cost of creating additional copies of copyrighted works compared to the significant expense of creating the work itself. As a result of this strategic pricing, for example, the price of a legitimately produced videocassette of a film in the United States can be more than six times the price of a legitimate copy of the same film in another country. Likewise, the price of educational materials in developing countries is vastly reduced by book publishers in order to make products affordable in local markets, encourage education, discourage piracy, and build literacy and good relations.

By strategically pricing their products, copyright-based industries encourage local demand and development of

local infrastructure for such products. This has at least two significant benefits. First, it encourages further creative activity by promoting markets from which copyright owners, which have made a significant investment in producing works, can recoup such investment. In this way, strategic pricing serves one of the fundamental purposes of the Copyright Act -- to promote creative expression by allowing copyright owners to realize economic benefit from their creations. Second, development of local demand for copyrighted works promotes the wide dissemination of copyrighted works. Strategic pricing in this way serves the principal purpose of the Copyright Act -- "promoting broad public availability of literature, music, and the other arts" and thus creating a private incentive "to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

For copyright owners, the downside to the variation in pricing between the domestic and international markets is that it becomes economically viable and profitable for third parties to import into the United States legitimate copyrighted works distributed abroad, thus creating direct competition with the same works being exploited domestically by the copyright owner. This incentive and ability to exploit price differentials through cross-border movement of copies is likely to increase in the future, as language barriers throughout the world continue to erode and more English-language versions of copyrighted works are distributed abroad. Moreover, with technological innovations such as the advent of the digital versatile disc ("DVD") format, motion pictures released on DVD in many foreign markets will be formatted in multiple languages, including English and home country languages. This may increase the incentive for parallel imports into the United States of DVD products that are sold abroad at reduced prices, but that are capable of being played for U.S. audiences.

Importation and distribution of copies acquired at reduced prices outside the United States derogate the Copyright Act's mandate of allowing the copyright owner to control the pricing and distribution of works and, consequently, the Act's purpose of fostering creativity.

3. Content

Because of the varying cultural appeal of many copyright-based works, owners may distribute their works with varying content in different national markets. Due to censorship or marketing reasons, as well, a title in one market may have varied content from the U.S. release. For example, a compact disc released in a foreign country may contain different or additional "tracks" than a similar recording by the same artist released in the United States. Yet versions released for foreign distribution will, if imported, likely compete directly with similar copyrighted works distributed in the United States. Importation of copies intended for audiences abroad, but available in the United States, therefore interferes with the copyright owner's creative decision concerning what to distribute in a given market, and displaces sales of the U.S. works.

In view of the significance for copyright-based industries of variations in timing, pricing, and content of products released in different markets, the section 602(a) right to prevent unauthorized imports of copyrighted works is critical to protecting core elements of the exclusive distribution right conferred by the Copyright Act.

II. The First Sale Doctrine In Section 109(a) Is Not A Defense To Unauthorized Importation Or Subsequent Sale Of Copies Distributed By The Copyright Owner Outside The United States

Section 109(a) of the Copyright Act limits the distribution right by allowing the owner of a lawfully made

copy to sell or dispose of that copy without permission of the copyright owner. It provides in relevant part:

> § 109. *Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord.* (a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of the copy or phonorecord.

17 U.S.C. § 109. Section 109(a) recodifies the "first sale" doctrine initially enacted in the 1909 Copyright Act and first articulated by this Court in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908). As courts have recognized repeatedly, the "first sale" doctrine of section 109(a) reflects a balance between protecting the distribution rights of the copyright owner, and protecting against restraints on alienation that would limit rights of the owner of the tangible object or copy in which the copyrighted work is embodied. *See, e.g., Sebastian Int'l, Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093, 1096 (3d Cir. 1988).

There is no issue in this case that the first sale doctrine does not provide a defense to claims under section 602(b) against unauthorized importation of *piratical* copies, or to section 106(3) claims against subsequent U.S. sale of imported piratical copies. Section 109(a) on its face applies only to sale or disposition of copies "lawfully made under this title." No reasonable construction would support an argument that pirated copies, wherever made, are "lawfully made under this title."

Nor is there any contention that section 109(a) provides a defense to section 602(a) claims against

unauthorized importation of nonpirated copies that are *manufactured outside the United States*, or to a section 106(3) claim against U.S. sale after importation of such copies. Indeed, virtually every court to date that has considered the issue has held that section 109(a) in no way limits a copyright owner's rights with respect to copyrighted goods manufactured and distributed abroad.[5]

The only issue before the Court is the interplay of section 109(a) and section 602(a) when the goods at issue are legitimately manufactured in the United States and initially

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[5] *See Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477 (9th Cir. 1994) (unauthorized importation and sale of perfume bottles manufactured and first sold in France not protected by the first sale defense), *cert. denied*, 514 U.S. 1004 (1995); *BMG Music v. Perez*, 952 F.2d 318 (9th Cir. 1991) (unauthorized importation and sale of phonorecords manufactured and sold abroad is actionable infringement not protected under the first sale doctrine), *cert. denied*, 505 U.S. 1206 (1992); *CBS Inc. v. Casino Record Distributors of Florida, Inc.*, 654 F. Supp. 677 (S.D. Fla. 1987) (record store proprietor's sale and distribution of phonorecords manufactured abroad and imported without copyright owner's authorization constituted infringement); *Hearst Corp. v. Stark*, 639 F. Supp. 970 (N.D. Cal. 1986) (first sale doctrine not a defense to unauthorized importation of copyrighted books manufactured and sold in United Kingdom); *Columbia Broadcasting Sys., Inc. v. Scorpio Music Distributors, Inc.*, 569 F. Supp. 47 (E.D. Pa. 1983) (first sale doctrine not a defense to unauthorized importation of phonorecords manufactured and sold in Philippines), *aff'd mem.*, 738 F.2d 421 (3d Cir. 1984); *see also Original Appalachian Artworks, Inc. v. J.F. Reichert, Inc.*, 658 F. Supp. 458, 462-463 (E.D. Pa. 1987) (unauthorized importation and sale of dolls manufactured in Europe constituted copyright infringement under section 602(a)); *Nintendo of America, Inc. v. Elcon Industries, Inc.*, 564 F. Supp. 937, 943-944 (E.D. Mich. 1982) (unauthorized importation of copyrighted games manufactured in Japan is actionable under section 602(a)). *But see Red Baron-Franklin Park, Inc. v. Taito Corp.*, 9 U.S.P.Q.2d (BNA) 1901, 1989 Copy. L. Rep. (CCH) ¶ 26,352 (E.D. Va. Aug. 29, 1988) (section 602(a) claim against importation of game boards manufactured and sold in Japan barred by first sale doctrine).

distributed abroad. According to petitioner, "[t]he principal question in this case is whether Section 602(a), like the other components of the distribution right, is limited by the first sale doctrine of Section 109(a)" in such circumstances. Pet. Br. at 13. In arguing that section 109(a) provides a defense to claims of unauthorized importation and subsequent U.S. sale of legitimate copies distributed outside the United States, petitioner proposes that section 109(a) creates an "unqualified" "safe harbor" and a "blanket authorization" for the owner of a lawfully made copy to sell or otherwise dispose of the possession of that copy, regardless of how the copy was acquired. Pet. Br. at 14-15.

Contrary to petitioner's position, the first sale doctrine is not a defense to unauthorized acts of importation. By its terms, it authorizes an owner of a legitimate copy to sell or otherwise dispose of possession of that particular copy, not to import the copy into the United States.

Nor does the first sale doctrine provide a defense to subsequent U.S. sale of copies imported without the consent of the copyright owner when those copies were initially distributed outside the United States. For nearly a century, this Court has held that the Copyright Act has no application to acts occurring outside the boundaries of the United States. A distribution of copies abroad does not constitute an exercise of the exclusive distribution under section 106(3) of the U.S. Copyright Act, but rather is an act protected (if at all) by rights conferred under foreign copyright law.

Section 109(a) of the U.S. Copyright Act, however, limits or "exhausts" only the section 106(3) right and cannot limit or exhaust distribution rights conferred by foreign law. Because a copyright owner retains a valid and subsisting section 106(3) right with respect to copies initially distributed abroad, the owner may, without limitation of the first sale defense, maintain a section 602(a) claim against unauthorized

importation of copies distributed abroad, and a section 106(3) claim against subsequent U.S. sale of such copies.

A. The First Sale Doctrine Is Not A Defense To Section 602(a) Claims Against Unauthorized Importation Of Goods Acquired Outside The United States

The language of section 109(a) and the structure of the Copyright Act establish that the first sale doctrine is not a defense to unauthorized acts of importation.

First, section 109 by its terms only allows an owner of a particular tangible copy of a copyrighted work to "*sell* or otherwise *dispose of the possession* of the copy or phonorecord." 17 U.S.C. § 109(a) (emphasis added). It does not grant the owner of that copy the right to import the copy into the United States. Importation is distinct from sale or disposition. As noted, importation entails only the carrying of copies or goods across borders, and does not, by definition, necessarily involve sale or transfer of possession.

If importation were not distinct from sale or distribution, there would be no need for section 602: Unauthorized sale or other disposition of possession of imported copies in the United States would be, and is, actionable by a copyright owner under section 106(3). Moreover, there would be no need for the various exceptions to section 602(a) liability expressly set forth by Congress. In particular, there would be no need for the exception to section 602(a) which allows unauthorized importation of copies "forming part of [a] person's personal baggage" if such copies are "for the private use of the importer and not for distribution." 17 U.S.C. § 602(a)(2). Importation of a few copies "for private use and not for distribution" cannot, by definition, constitute a distribution "to the public." If importation were a form of sale or other distribution, or otherwise limited by the first sale doctrine, the "private use"

exception to the importation right would be wholly superfluous. *See generally Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 358 (1990) (in interpreting Copyright Act, noting "the established principle that a court should give effect, if possible, to every clause and word of a statute") (quotation omitted).

Second, the plain language of section 109(a) defines its applicability as limited to claims under section 106(3). Section 109(a) states that it applies "[n]otwithstanding the provisions of section 106(3)." The section nowhere states that it also applies notwithstanding section 602(a).

Third, the title of section 109, "Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord," clearly states that the first sale defense limits only "exclusive rights" under the Copyright Act. *See, e.g., Immigration and Naturalization Serv. v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-190 (1991) (title of statute or section aids in interpretation of legislation's text); *see generally* 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION (5th ed. 1992) § 54.07, at 267 (same). Section 602, however, is not denominated an "exclusive right" under the Act, is not included in section 106's list of exclusive rights, and is not part of Chapter 1 of the Copyright Act which governs the "subject matter and scope of copyright." The limitations on exclusive rights therefore do not apply to section 602. Moreover, section 501, which provides for private infringement actions against "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . *or* who imports copies or phonorecords into the United States in violation of section 602," 17 U.S.C. § 501(a) (emphasis added), recognizes section 602 as separate and apart from the rights set forth and limited "by sections 106 through 118."

Accordingly, by its express language, statutory title, and placement within the Act's structure, section 109(a) limits only a copyright owner's exercise of the exclusive distribution right, and not the importation right. The first sale doctrine therefore may not be invoked as a defense to a section 602(a) claim against acts of unauthorized importation of copies first distributed abroad.[6]

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6 Quality King suggests in passing, for the first time in its brief on the merits before this Court, that it was not the actual importer of the goods in question. Pet. Br. at 4-5 & n.1, 14 n.6. The issue whether an entity can be liable for copyright infringement for subsequently selling goods that were imported without authorization, if it did not engage in the acts of importation, is not properly before the Court. Despite the district court's order enjoining Quality King from importing as well as selling the goods at issue, Quality King did not argue in the Ninth Circuit that it was not the importer. *See Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981) (even question presented in petition but "not raised in court of appeals . . . is not properly before us"). Nor did Quality King otherwise preserve the issue for review in its question presented in the petition for certiorari. *See* U.S. Supreme Court Rule 14.1(a); *Yee v. Escondido*, 503 U.S. 519, 535-538 (1992).

Moreover, The Ninth Circuit, at numerous points in its decision below, concluded that Quality King had acquired L'anza's hair care products outside the United States and imported them without authority of L'anza. *See, e.g.*, Appendix to Petition for Certiorari ("Pet. App.") at A2 (products had been purchased from a distributor in Malta and "imported (without L'anza's authorization) by Quality King Distributors"); Pet. App. at A2-A3 (Maltese distributor "sold the products to Quality King Distributors, which purchased in their entirety the three shipments that had been sent to the United Kingdom and imported the products back into the United States without L'anza's permission"); Pet. App. at A17 ("the record indicates that Quality King purchased the L'anza products from a subdistributor in Malta"). Finding that section 109(a) does not provide a defense to claims under section 602, the Ninth Circuit thus held that Quality King was liable for infringement of L'anza's section 106(3) distribution right by importing goods acquired abroad without authority of L'anza.

B. The First Sale Doctrine Is Not A Defense To Section 106(3) Claims Against Sale After Importation Of Copies Initially Distributed By The Copyright Owner Outside the United States

Petitioner nevertheless argues that L'anza may maintain a claim under section 602(a) only if subsequent U.S. distribution of nonpirated imported products by Quality King "would infringe the U.S. copyright owner's exclusive rights delineated in Section 106(3)." Pet. Br. at 19. Petitioner states that "[o]nce the copyright owner has parted with ownership of a copy, Congress intended that his distribution rights would 'cease'" with respect to that copy pursuant to the first sale doctrine of section 109(a), Pet. Br. at 21, such that there would be "left no such [section 106(3)] right to be infringed under Section 602(a)," Pet. Br. at 15.

Petitioner's argument misses the point at one critical juncture. Even if this Court were to accept that the right of action against unauthorized importation set forth in section 602(a) is contingent upon subsistence of the section 106(3) right with respect to the particular copies, such a holding would have no bearing on this case. The district court below concluded, as a finding of fact, that the copyrighted goods in question had been initially distributed abroad by L'anza. *See* Pet. App. at B7 ("the works were manufactured in the United States and sold abroad"). Quality King has never contested that finding, either in the Ninth Circuit or in its petition for certiorari before this Court. Indeed, in its brief on the merits, petitioner consistently maintains that L'anza shipped the goods for distribution outside the United States. *See, e.g.*, Pet. Br. at 4 ("L'anza shipped the goods from the United States for delivery to L. Intertrade in Malta, . . . [understanding] that they would be distributed in Malta and 'possibly Libya.'"); Pet. Br. at 15 ("L'anza sold the products to its United Kingdom distributor").

Section 106(3) grants to copyright owners the exclusive right to distribute publicly within the United States works that are the subject of a valid U.S. copyright. A foreign distribution is not an exercise of the distribution right under section 106(3) of the Copyright Act. L'anza did not exercise its section 106(3) right of U.S. distribution when it "sold the products to its United Kingdom distributor." Pet. Br. at 15. Its section 106(3) right with respect to those copyrighted goods accordingly was not extinguished as a result of the distribution or "first sale" abroad so as to bar a claim seeking to prevent subsequent importation or U.S. sale of those goods.[7]

In *Equal Employment Opportunity Commission v. Arabian American Oil Company*, 499 U.S. 244, 248 (1991) (citations omitted), this Court reaffirmed the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' This 'canon of

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[7] Petitioner does not contend in this Court, and has not argued at any point in this litigation, that, with respect to the goods at issue, any acts of sale or distribution by L'anza occurred within the United States. Indeed, under well-settled principles of copyright law, the act of transferring goods to a carrier for shipment to a purchaser abroad does not constitute an act of distribution under the Copyright Act. *See, e.g., Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847, 851 (2d Cir. 1963) (rejecting contention that bailees including shippers have title to copyrighted works in their possession); *Little, Brown and Co. v. American Paper Recycling Corp.*, 824 F. Supp. 11, 16 (D. Mass. 1993) (transfer of goods for destruction created a bailment and not a sale); *see also* Pet. Br. at 26 (bailee, such as shipper or a warehouse company, is not conferred ownership of copy). Nor does an act within the United States, consisting of authorizing or licensing distribution abroad, implicate exercise of an exclusive right under the Copyright Act. *See Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1094-1095 (9th Cir.) (mere act of authorizing distribution abroad does not implicate U.S. Copyright Act), *cert. denied*, 513 U.S. 1001 (1994).

construction . . .' serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."

Applying this longstanding principle, U.S. courts and commentators consistently have taken as "undisputed" the "axiom that United States copyright law has no extraterritorial application" and that "a primary activity outside the boundaries of the United States" does "not constitut[e] an infringement cognizable under the Copyright Act." 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (1997) § 12.04[A][3][b], at 12-88 (footnotes omitted); *see also Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1094 (9th Cir.) ("Because the copyright laws do not apply extraterritorially, each of the rights conferred under the five section 106 categories must be read as extending 'no farther than the [United States'] borders.'" (quoting 2 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 16.0, at 675 (1989))), *cert. denied*, 513 U.S. 1001 (1994). Indeed, the Ninth Circuit has characterized the principle against extraterritorial application of the U.S. Copyright Act as based on "eighty years of consistent jurisprudence." *Subafilms*, 24 F.3d at 1095.

This Court itself, for nearly a century, has recognized that acts occurring outside the territorial boundaries of the United States do not implicate rights conferred by the U.S. Copyright Act. In *United Dictionary Co. v. Merriam Co.*, 208 U.S. 260 (1908), the Court considered whether notice provisions of the U.S. Copyright Act applied to publication of a book in England, such that omission of notice of American copyright from the English publication would destroy U.S. copyright in the book. The Court noted that although "Congress could attach what conditions it saw fit to its grant" of copyright, "it is unlikely that it would make requirements of personal action beyond the sphere of its control." 208

U.S. at 264. The Court accordingly held that publication in England of a U.S. copyrighted work was not governed by the notice provisions of the U.S. Copyright Act. *See also Ferris v. Frohman*, 223 U.S. 424, 434 (1912) ("[t]he deprivation of the common-law right [under English law by virtue of the English performance], by force of the statute, was plainly limited by the territorial bounds within which the operation of the statute was confined" such that performance in England had no effect upon rights under U.S. copyright law).

Consistent with the "undisputed" axiom that the Copyright Act does not cover or extend its protections to acts occurring beyond the boundaries of the United States, it is well established that a distribution of copyrighted goods outside the United States does not constitute an exercise of the section 106(3) right under the U.S. Copyright Act. *See, e.g., De Bardossy v. Puski*, 763 F. Supp. 1239 (S.D.N.Y. 1991) (U.S. courts lack subject matter jurisdiction under the Copyright Act over distribution of U.S. work outside the United States). It is, rather, a distribution governed only under rights conferred by foreign copyright law.

The first sale doctrine of section 109, however, limits only U.S. distribution rights under section 106(3). It cannot limit or exhaust distribution rights exercised pursuant to foreign law. Because a copyright owner retains a subsisting section 106(3) right with respect to copies distributed abroad, the owner may, without limitation of the first sale defense, maintain a section 602(a) claim against unauthorized importation of those copies, and a section 106(3) claim against their subsequent U.S. sale after importation. *See Denbicare U.S.A. Inc. v. Toys "R" Us, Inc.*, 84 F.3d 1143, 1149-1151 (9th Cir.) (first sale doctrine applies only to copies distributed within United States), *cert. denied*, ___ U.S. ___, 117 S. Ct. 190 (1996); *Parfums Givenchy, Inc. v. Drug*

Emporium, Inc., 38 F.3d 477 (9th Cir. 1994) (same), *cert. denied*, 514 U.S. 1004 (1995).[8]

Thus even under petitioner's reading of the Copyright Act, pursuant to which an unauthorized importation could not be actionable if the section 106(3) distribution right had been exercised with respect to the copies at issue, Quality King's importation and subsequent sale of goods distributed by L'anza outside the United States is an infringement. To hold otherwise would be to disregard "eighty years of consistent jurisprudence," *Subafilms*, 24 F.3d at 1095, concerning the territorial scope of the exclusive rights conferred under the U.S. Copyright Act.[9]

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[8] This territoriality principle governing exhaustion of copyright is an underpinning of international copyright law. Prior to formation of the European Community, a copyright owner's national distribution right under the copyright laws of most European nations was not extinguished by a "first sale" in another country. Since formation of the European Community, the copyright laws of the European member states are being "harmonized" such that the distribution of a copy anywhere within the European Community, but not outside the Community, exhausts the exclusive distribution right. *See generally* Jan Corbet, *The Law Of The EEC And Intellectual Property*, 13 J.L. & COMMERCE 327, 333-336 (1994) (discussing territoriality limits to exhaustion under the first sale doctrine and emergence of the European Community).

[9] Petitioner and *amici curiae* Costco Companies, Inc. *et al.* recognize the territorial limits of the Copyright Act, but nevertheless make a bizarre distinction in attempting to limit the territoriality principle. They argue that if the particular copies are made under authority of an entity that owns the U.S. copyright as well as all foreign copyrights, rather than under the authority of "an unrelated assignee or licensee solely of foreign rights," sale or distribution of the particular copies is a "first sale" so as to extinguish the section 106(3) right under the U.S. Copyright Act, even if the copies were made and distributed abroad. *See* Brief of *Amici Curiae* Costco *et al.* In Support of Petitioner at 10-11; Pet. Br. at 27-28. This distinction is baseless. That the foreign copyright owner may be the same entity as the U.S. copyright owner does not mean that the reproduction, sale or distribution of particular

[Footnote continued on next page]

C. The First Sale Doctrine Does Not Grant An Affirmative Right To Owners Of Copies

Petitioner's principal argument is that a copyright owner may not bar unauthorized importation or subsequent sale of goods it has distributed, even if the distribution occurred outside the United States, because the owner's section 106(3) right with respect to those goods has been exercised and exhausted under the first sale doctrine. Alternatively, however, petitioner seems to suggest that, even if the copyright owner's section 106(3) right has not been exercised and thus subsists, section 109 provides an "unqualified" "safe harbor," Pet. Br. at 14, and "blanket authorization," *id.* at 15, for an owner of particular copies to dispose of those copies. *See also* Pet. Br. at 27 n.11. This reading of section 109(a) would turn on its head the language, structure, and purpose of the Copyright Act.

Under the Copyright Act, section 106 sets forth the affirmative grant of rights, and sections 107 through 120 establish limitations thereto. Section 106(3) grants to copyright owners the exclusive right to prevent unauthorized distribution of copies, subject to the limitations of sections 107 through 120. An unauthorized distribution of copies is thus presumptively prohibited by section 106(3), unless such a distribution falls specifically within the limitations of sections 107 through 120.

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copies outside the United States is an exercise of a right conferred by U.S. copyright law. Rather, even if the same entity owns the U.S. and foreign copyrights in particular copies, the right to manufacture or distribute those copies outside the United States can only be governed by foreign law (*i.e.*, as a result of the foreign copyright, rather than the U.S. copyright).

Contrary to petitioner's assertion, the Copyright Act grants affirmative rights to copyright owners, not to users of copyrighted material. Section 109(a) is not an affirmative grant of a right to owners of copies, but rather a limitation on the otherwise presumptive ability of the copyright owner to block disposition of copies that have been the subject of the copyright owner's "first sale" or distribution. The availability of section 109(a) as a defense to claims of unauthorized distribution of copies therefore depends upon whether or not the section 106(3) right has been exercised with respect to those copies.

This fundamental underpinning of the first sale doctrine is plain from the language of the statute. The caption of section 109(a) states that it sets forth a "limitation[] on exclusive rights" arising from the "[e]ffect of transfer of particular copy or phonorecord." Absent a transfer or distribution resulting from the exercise of the exclusive right, section 109(a) is not implicated.

That the first sale doctrine depends for application upon exercise of the distribution right by the copyright owner moreover finds expression in the legislative history of section 109(a), the legislative history of its predecessor under the 1909 Copyright Act, and the earliest articulations of the first sale doctrine by this Court and other courts.

In *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908), this Court enunciated the first sale doctrine as follows: "The purchaser of a book, *once sold by authority of the owner of the copyright*, may sell it again, although he could not publish a new edition of it." (Emphasis added.) *See also Henry Bill Publishing Co. v. Smythe*, 27 F. 914, 925 (S.D. Ohio 1886) ("if he sells a copy to another, *having, as owner of the copyright, authorized a transfer*, the purchaser takes the copy with the ordinary incident of alienation belonging to all property" (emphasis added)).

When Congress thus enacted section 41 of the 1909 Copyright Act, the statutory predecessor of section 109(a), it made clear that "Section 41 is not intended to change in any way existing law . . . . [I]t would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright *after said proprietor has made the first sale.*" H.R. Rep. No. 2222, 60th Cong., 2d Sess. 28-29 (1909) (emphasis added); S. Rep. No. 1108, 60th Cong., 2d Sess. (1909) (adopting House Report). Indeed, courts interpreting the 1909 Act's codification of the first sale doctrine recognized that the doctrine did not provide an absolute "safe harbor" to owners of copies. *See Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847, 854 (2d Cir. 1963) (rejecting the "absolutist contention that anyone in lawful possession of copyrighted goods may sell them without infringement" in favor of a rule that first sale doctrine allows an owner of a copy to vend that copy only if it has been the subject of a valid first sale by or on behalf of the copyright owner); *Independent News Co. v. Williams*, 293 F.2d 510, 517 (3d Cir. 1961) ("where the publisher has parted with the title to the copyrighted work" subsequent purchasers may vend that copy freely).

Likewise, in enacting section 109(a) of the 1976 Copyright Act, Congress stated that "Section 109(a) restates and confirms the principle that, *where the copyright owner has transferred ownership of a particular copy or phonorecord of a work*, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental or any other means." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 79 (1976) (emphasis added); S. Rep. No. 473, 94th Cong., 1st Sess. 71 (1975).

Petitioner's contention that section 109(a) grants to Quality King the affirmative right to sell copies, regardless whether or not those copies were subject to the copyright owner's initial distribution or "first sale" under section 106(3),

is thus contrary to the language and structure of the Copyright Act, legislative history of the provision, and seminal articulations of the first sale doctrine's underpinnings. Because section 109(a) does not provide an unqualified safe harbor for an owner of copies to dispose of those copies, the Court must look to whether or not the section 106(3) right has been exercised and exhausted with respect to such copies. Because the U.S. distribution right is not exercised by a copyright owner's distribution of copies abroad, the owner may bar unauthorized importation and subsequent U.S. sale of such copies.

CONCLUSION

For the foregoing reasons, the Court should reject petitioner's attempt to eviscerate the protections of section 602, to disregard at least "eighty years of consistent jurisprudence" concerning the territorial scope of the Copyright Act, and to rewrite limitations on exclusive rights as affirmative rights of copyright users. *Amici curiae* respectfully seek affirmance of the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Appendix

APPENDIX

§ 602. *Infringing importation of copies or phonorecords.* (a) Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501. This subsection does not apply to --

> (1) importation of copies or phonorecords under the authority or for the use of the Government of the United States or of any State or political subdivision of a State, but not including copies or phonorecords for use in schools, or copies of any audiovisual work imported for purposes other than archival use;
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> (2) importation, for the private use of the importer and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the United States with respect to copies or phonorecords forming part of such person's personal baggage; or
>
> (3) importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes,

unless the importation of such copies or phonorecords is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2).

(b) In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited. In a case where the copies or phonorecords were lawfully made, the United States Customs Service has no authority to prevent their importation unless the provisions of section 601 are applicable. In either case, the Secretary of the Treasury is authorized to prescribe, by regulation, a procedure under which any person claiming an interest in the copyright in a particular work may, upon payment of a specified fee, be entitled to notification by the Customs Service of the importation of articles that appear to be copies or phonorecords of the work.